

MAR 18 1993

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In re Applications of)	MM DOCKET NO. 92-308
)	
CAROLINE K. POWLEY d/b/a)	File No. BPCT-900518KO
UNICORN SLIDE)	
)	
TRUDY M. MITCHELL)	File No. BPCT-900726KG
)	
)	
For Construction Permit for)	
New Television Station)	
Slidell, Louisiana)	

To: Administrative Law Judge
 Richard L. Sippel

**MASS MEDIA BUREAU'S COMMENTS ON JOINT REQUEST
 FOR APPROVAL OF SETTLEMENT AGREEMENT**

1. On February 1, 1993, Caroline K. Powley d/b/a/ Unicorn Slide ("US") and Trudy M. Mitchell ("Mitchell") (hereinafter, collectively, "Petitioners"), the applicants in the above-captioned proceeding, filed a Joint Request for Approval of Settlement Agreement. On February 17 and 26, and March 5 and 11, 1993, Petitioners filed supplements. The Mass Media Bureau submits the following comments.

2. With the exceptions noted below, which do not affect approval, the Joint Request and supporting materials submitted by Petitioners satisfy the requirements of Sections 73.3525(a)(1) and (a)(2) of the Commission's Rules, which implement Section

311(c)(3) of the Communications Act of 1934, as amended. Specifically, Petitioners have established that approval of the agreement is in the public interest and that none of the applications was filed for an improper purpose.

3. The settlement agreement, as supplemented, contemplates the dismissal of the US application, in exchange for monetary consideration not to exceed \$35,000, and the grant of Mitchell's application. In the Bureau's view, Petitioners have shown that they are entitled to reimbursement of legal fees¹ of \$17,800, plus related out-of-pocket expenses of \$469.11, \$2,250.00 for an application filing fee, engineering expenses of \$19,000 plus related out-of-pocket expenses of \$875, and out-of-pocket expenses of US principal Caroline Powley totalling \$402.96. Thus, they are entitled to reimbursement of \$40,797.07. Because the settlement agreement contemplates reimbursement of no more than \$35,000, the agreement can be approved with reimbursement of the full \$35,000.

4. Several matters warrant the Bureau's comment, however. In our view, a claimed "facilitator expense" is not reimburseable. Petitioners supply the sworn statement of Ron

¹ We disagree with the argument made by Mitchell in her Request for Itemization of Expenses, filed March 5, 1993, at p.2, namely, that "[a] listing of the time spent on these pleadings and other matters" by attorneys for US must accompany a request for reimbursement. In Amendment of Section 73.3525, 6 FCC Rcd 85, n. 54 (1990) the Commission specifically rejected this approach.

Baptist, a telecommunications consultant and broker who avers that he has served as a settlement facilitator in this and other cases². We are aware that, in Amendment of Section 73.3525, 6 FCC Rcd 85, 87 (1990), the Commission changed its earlier policy in order to allow, for the first time, reimbursement of expenses associated with the preparation and negotiation of settlement agreements. Nevertheless, the Commission did not change the underlying requirement that payments be limited to "legitimate and prudent out-of-pocket expenses." 6 FCC Rcd at 85. The facilitator expense claimed here has not been shown to be either prudent or out-of-pocket.

5. Other than such vague generalities as "I spent several hours by telephone negotiating with Ms. Mitchell, counsel for Ms. Mitchell as well as with counsel for Ms. Powley," the sworn statement does not set forth precisely what services Baptist performed for an applicant also represented by counsel. The Commission requires a description of specific activities. Amendment of Section 73.3525, supra, at n. 54. Moreover, the fact that Baptist first represented one of the two applicants and, ten months later, represented the other applicant, raises questions about the legitimacy and prudence of the expense. In any event, this expense is provocatively suspicious and simply

² The Bureau is not aware, nor does Baptist indicate, whether reimbursement for his facilitator fees has been allowed in other cases. In any event, each claim for reimbursement in each case must be supported by its own complete showing.

not "reasonably incurred," as the Commission defines "legitimate and prudent expenses." Section 73.3525(i).

6. We further submit that the claimed facilitator expense is not an "out-of-pocket expense" at all. See Amendment of Section 73.3525, supra, at 85. Indeed, it is not clear what constitutes the "consideration paid or promised."³ See Section 73.3525(a)(4). Petitioners list an amount of \$10,500, yet Baptist claims his contingent fee was \$15,000, which he is willing to reduce to \$7,500 if the Commission so requires, plus \$500 for his "out-of-pocket expenses." We submit that this "contingent fee" appears to be purely arbitrary, related more to what the Commission is willing to allow than what the applicant may have contracted to pay. In fact, no contract is provided by the parties. Finally, as to Baptist's out-of-pocket expenditures, neither an itemized accounting nor a description of the exact nature and amount of these expenses is included. See Sections 73.3525(a)(4) and (5).

7. The Bureau also opines that no more than \$402.96 in out-of-pocket expenses by "Caroline Powley and/or her consultants" is reimbursable. See Further Supplement filed March 5, 1993. The portion attributable to services of Gerald Proctor and of

³ Use of the phrase "paid or promised" makes clear that there is no Commission requirement that a petitioner show that the consideration was actually paid, or what portion is still owed. The request by Mitchell, in Comments filed March 10, 1993, that US be required to make such a showing should be rejected.

"Coordinator" John Powley are not segregated and the services are not sufficiently described to determine in what way they are related to the application. The relationship of telephone charges to the application is also unclear. For example, a

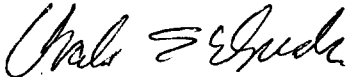
of operating the station. See. e.g., "Gerald Proctor (market and business study)," at Further Supplement filed March 5, 1993.

8. In any event, the Bureau believes that other allowable expenses exceed the \$35,000 reimbursement sought by US. Indeed, legal and engineering fees alone add up to more than \$35,000. These expenses, described in statements executed by the professionals involved, are supported to the degree required by the Commission. Amendment of Section 73.3525, supra, at n. 54. Mitchell's attacks in this regard, contained in a Request for Itemization of Expenses, filed March 5, 1993, and in Comments filed March 10, 1993, are unwarranted. Moreover, Mitchell's doubts about the veracity of these expenses are pure speculation. For the reasons indicated in the foregoing comments, the Bureau is satisfied that US has complied with Commission requirements with respect to legal and engineering fees. Since they, alone, support the amount claimed, the Bureau does not desire to conduct any further inquiry. The suggestion by Mitchell that a hearing be held so that "Commission counsel" (presumably, Bureau counsel) can examine US principals and consultants is preposterous and patronizing. As a party, the Bureau itself can request further inquiry if desired. Here, Mitchell is attempting to use Commission and Bureau resources to advance some private agenda. This smacks of an abuse of Commission processes. Moreover, the attendant waste of administrative resources is against the public interest and contravenes the very reason that the Commission

encourages settlements. Suffice it to state, for the record, that the Bureau has no questions to ask any witness which might be called to testify at such a hearing.

9. The Joint Request should be granted, the settlement approved, and the US application dismissed. Moreover, because Mitchell is fully qualified to be a Commission licensee, her application can be granted, with the condition set forth at ¶ 12 of the Hearing Designation Order, 8 FCC Rcd 321 (1993).

Respectfully submitted,
Roy J. Stewart
Chief, Mass Media Bureau


Charles E. Dziedzic
Chief, Hearing Branch

CERTIFICATE OF SERVICE

Michelle C. Mebane, a secretary in the Hearing Branch Mass Media Bureau, certifies that she has, on this 18th day of March, 1993, sent by regular United States mail, U.S. Government frank, copies of the foregoing "Mass Media Bureau's Comments on Joint Request for Approval of Settlement Agreement" to:

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